

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review.

### ISSUES

Because the Special Administrative Law Judge found that claimant had not established that he presently suffers greater functional impairment or disability as the result of his July 26, 1989 work-related injury, the Judge denied claimant's request for increased benefits in this review and modification proceeding. The claimant requested this review. The sole issue now before the Appeals Board is whether claimant has proven that he is entitled to an increased award of permanent partial disability benefits.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the findings and award of the Special Administrative Law Judge dated March 3, 1995, should be affirmed.

Claimant injured his back on July 26, 1989 while working for the respondent. An award was entered on October 6, 1992, granting claimant permanent partial disability benefits based upon a thirteen percent (13%) functional impairment. Claimant requested review and modification of that award and on March 3, 1995, Special Administrative Law Judge William F. Morrissey entered his decision denying an increase in benefits.

Claimant contends his physical condition has deteriorated and he is now entitled to a work disability for the injuries he sustained in his July 1989 work-related accident. In the alternative, claimant contends his permanent partial benefits should be increased because the initial impairment rating provided by Dr. Baker did not take into account claimant's loss of range of motion in the lumbosacral spine. Respondent contends that claimant's impairment has not increased or, in the alternative, that any increase was caused by subsequent work-related injuries.

Claimant bears the burden of proof to establish his claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

" . . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

The review and modification of awards is governed by K.S.A. 44-528(a), which provides:

"Any award of modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the

administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act."

The Appeals Board finds the claimant did not prove an increase in either functional impairment or disability due to the injuries received in his July 1989 work-related accident. Phillip L. Baker, M.D., the physician who evaluated claimant in 1991 and provided a thirteen percent (13%) functional impairment rating as a result of that evaluation, testified in this proceeding that he examined claimant again in August 1994 and that claimant's condition was essentially unchanged. At his attorney's request, claimant was evaluated in December 1993 by Daniel D. Zimmerman, M.D., who testified that he believed claimant did have an increase in impairment, but that it was caused by a worsening of the pathology affecting the lumbosacral spine and continued repetitive work activities. Based upon this testimony, it appears claimant's own expert believes that the alleged worsened condition has been caused by subsequent work activities.

Claimant's request to modify the award to increase permanent partial general disability benefits based upon an increased functional impairment rating from Dr. Baker should be denied. Review and modification is limited to situations where the factual circumstances have changed since the initial award or, perhaps, whether there is newly discovered evidence that was not available at the time of the initial award. The procedure may not, and must not, be used to relitigate the issues and facts before the administrative law judge at the time of the initial award. When the case was initially tried, Dr. Baker provided his opinion that claimant had a thirteen percent (13%) functional impairment. If claimant disagreed with that rating or the method and manner it was derived, the time to contest that rating was during that initial stage of litigation.

The findings and conclusions of the Special Administrative Law Judge are hereby adopted by the Appeals Board for purposes of this review to the extent they are not inconsistent with the findings and conclusions specifically set forth herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on March 3, 1995, should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frederick J. Patton, II, Topeka, Kansas  
Bret C. Owen, Topeka, Kansas  
Bob W. Storey, Topeka, Kansas  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director